Office-Supreme Court, U.S.
FILED
JUL 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1898

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOHNNY BLACKMON,
Petitioner,

v.

OBSERVER TRANSPORTATION COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFERSON D. KIRBY, III
D. GERALD COKER
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Seventh Amendment guarantee of a jury trial in "suits at common law" requires a trial by jury in an action for reinstatement and backpay under the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. §§ 2021 *et seq.*

STATEMENT OF CORPORATE RELATIONSHIPS

Pursuant to Rule 28.1 of the Rules of this Court, Respondent Observer Transportation Company certifies that it is affiliated with Knight Publishing Company and Knight-Ridder Newspapers, Inc., and that it has no other parent corporations, subsidiaries, or affiliates.

TABLE OF CONTENTS

	Page
Statement of the Case	1
The Proceedings Below	2
Summary of the Argument	4
Reasons for Denying the Writ	5
I. No Conflict Exists Among the Circuits	5
II. The Decision of the Fourth Circuit Is Consistent with the Decisions of this Court	8
Conclusion	14

TABLE OF AUTHORITIES

CASES

	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	8, 9, 10, 12
Alexander v. Chrysler Corp., ___ F.2d ___, 92 Lab. Cas. (CCH) ¶ 13,077 (6th Cir. 1981)	5, 6
Blackmon v. Observer Transportation Co., 756 F.2d 1000 (4th Cir. 1985)	5
Curtis v. Loether, 415 U.S. 189 (1974)	4, 10, 11, 13
Gall v. United States Steel Corp., 598 F.Supp. 769 (W.D. Pa. 1984)	7
Gruca v. United States Steel Corp., 495 F.2d 1252 (3d Cir. 1974)	4, 5, 6, 7
Hanna v. American Motors Corp., 724 F.2d 1300 (6th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 3512 (1984)	9, 10
Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1960)	12
Mowdy v. Ada Board of Education, 76 F.R.D. 436 (E.D. Okla. 1977)	2, 5, 6
Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189 (1974)	12
Stevens v. Tennessee Valley Authority, 712 F.2d 1047 (6th Cir. 1983)	7
Ufland v. Buffalo Courier Express, 394 F.Supp. 199 (W.D.N.Y. 1974)	2

United States v. Long, 537 F.2d 1151 (4th Cir. 1975), *cert. denied*, 429 U.S. 871 (1976) 12, 13

CONSTITUTION

U.S. Const., amend. VII 3, 8, 9

STATUTES

38 U.S.C. § 2022 ..... 9, 10, 11, 12

38 U.S.C. § 2024 9

42 U.S.C § 2000e 2, 11

42 U.S.C § 3612 ..... 10, 11

RULES AND REGULATIONS

Rule 17, Rules of the Supreme Court of the United States 5

MISCELLANEOUS

S. Rep. No. 93-907, 93rd Cong., 2d Sess. at 111 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-1898

JOHNNY BLACKMON,

Petitioner,

vs.

OBSERVER TRANSPORTATION COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Observer Transportation Company employed Petitioner Johnny Blackmon, a member of the United States Army Reserves, as a truck driver from February, 1978 until September, 1981 (R 35).[1] On September 21, 1981, Petitioner left his job duties to attend Reserve training camp without requesting a leave of absence as required by the Vietnam Era Veterans' Readjustment Assistance Act (hereinafter "Veterans' Readjustment Act" or "the Act"), 38 U.S.C. §§ 2021 *et seq.* (R 139-40). Respondent subsequently terminated

[1] References to the record are cited as "R _," while "Appx. _" denotes citation to the Appendix to the Petition for a Writ of Certiorari.

the employment of Petitioner as a result of his failure to request the necessary leave of absence before abandoning his duties (Appx. 31).

On October 23, 1981, Petitioner filed a civil action pursuant to the Veterans' Readjustment Act in the United States District Court for the Western District of North Carolina (R 3). In his Complaint, Petitioner requested that the court "compensate [him] for all lost wages, compensation and benefits and enjoin [Respondent] to reinstate [him] to his employment without loss of seniority, benefits or compensation." (R 3). After Respondent had filed its Answer to the Complaint, Petitioner requested that his action be tried before a jury (R 8). On June 1, 1982, Respondent moved to strike Petitioner's demand for a jury trial (R 9).

THE PROCEEDINGS BELOW

By order dated June 15, 1982, the District Court granted Respondent's motion to strike Petitioner's demand for a trial by jury (Appx. 33). As the basis for its decision, the Court noted that the reported decisions interpreting the Act have characterized claims brought pursuant to its provisions as equitable claims. The District Court relied specifically on *Mowdy v. Ada Board of Education*, 76 F.R.D. 436 (E.D. Okla. 1977) and *Ufland v. Buffalo Courier Express*, 394 F. Supp. 199 (W.D.N.Y. 1974), which analogize claims brought under the Act to those brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The District Court concluded that the monetary relief available under the Act is an "integral part of the statutory equitable remedy," and that such relief is to be determined "through the exercise of the court's discretion, and not by a jury." (Appx. 34).

In a subsequent non-jury trial, the District Court found that Petitioner had failed to establish entitlement to any relief under the Act (Appx. 29). Petitioner then appealed that decision to the United States Court of Appeals for the Fourth Circuit (R 18). As the sole issue on appeal, Petitioner contended that the District Court's denial of his demand for a jury trial violated the Seventh Amendment to the United States Constitution.

Following a June 7, 1983 oral argument before a designated panel, the Fourth Circuit set Petitioner's appeal for a rehearing en banc (Appx. 35). For purposes of oral argument, the Court consolidated Petitioner's case with the case of *William P. Troy v. City of Hampton,* Civil Action No. 81-152-NN, which involved the same issue (Appx. 3). The rehearing en banc was held on December 5, 1983 (Appx. 1).

On March 5, 1985, the Court of Appeals issued its decision affirming the District Court's denial of Petitioner's demand for a trial by jury (Appx. 1). The Court concluded in its opinion that the remedies provided by the Veterans' Readjustment Act are equitable in nature, and do not require a trial by jury. In support of its decision, the Court first noted that the 1974 amendments to the Act and the accompanying legislative history "clearly indicate" that Congress intended the rights and remedies established by the Act to be equitable in nature (Appx. 6). The Court further recognized that the remedial provisions of the Act are analogous to those of Title VII, which do not require a trial by jury (Appx. 6-7).

SUMMARY OF THE ARGUMENT

Petitioner's contention that there is a conflict among the Circuits with regard to the right to a jury trial under the Veterans' Readjustment Act is without merit. No Court of Appeals has ever held that the parties to an action under the Act are entitled to a trial by jury, and the Fourth and Sixth Circuits have held to the contrary.

Although the Third Circuit, in *Gruca v. United States Steel Corp.*, 495 F.2d 1252 (3d Cir. 1974), held that the remedies available under the Act are legal in nature, *Gruca* was overruled by Congress in the 1974 amendments to the Act. The legislative history of the amendments and subsequent judicial decisions demonstrate that *Gruca* is no longer valid. Therefore, Petitioner's reliance on *Gruca* in an attempt to show that the Circuits are in conflict is misplaced.

Petitioner's contention that the Fourth Circuit improperly analogized the remedial provisions of the Veterans' Readjustment Act to those of Title VII is also meritless. Both Title VII and the Act provide for purely equitable relief that may include awards of backpay and reinstatement. Title VIII, by contrast, specifically provides for awards of actual and punitive damages, and its remedial provisions were deemed legal in nature by this Court in *Curtis v. Loether*, 415 U.S. 183 (1974). The remedial provisions of the Act bear no resemblance to those of Title VIII, and Petitioner's claim that the denial of his demand for a jury conflicts with the Court's decision in *Curtis v. Loether* has no merit.

Petitioner has failed to show that there exists a conflict among the Circuits or that the decision of the

Fourth Circuit below conflicts with prior decisions of this Court. Accordingly, his Petition for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. NO CONFLICT EXISTS AMONG THE CIRCUITS

In his Petition for a Writ of Certiorari, Petitioner urges this Court to "resolve the conflict between the Third, Fourth and Sixth Circuits concerning the legal or equitable nature of the remedy afforded" by the Veterans' Readjustment Act.[2] This purported conflict among the Circuits, according to Petitioner, stems from the decision of the Third Circuit in *Gruca v. United States Steel Corp.*, 495 F.2d 1252 (3d Cir. 1974), in which the Court of Appeals found the remedies available under the Act to be legal for purposes of determining the applicable statute of limitations.

Petitioner's reliance on the Third Circuit's decision in *Gruca* is misplaced. No Court of Appeals has ever held that the parties in an action under the Veterans' Readjustment Act are entitled to a trial by jury. By contrast, the Sixth Circuit, and now the Fourth Circuit in the case *sub judice*, have directly addressed this issue, and both have held that the Act establishes no right to a trial by jury. *See Blackmon v. Observer Transportation Co.*, 756 F.2d 1000 (4th Cir. 1985); *Alexander v. Chrysler Corp.*, ___ F.2d ___, 92 Lab. Cas. (CCH) ¶ 13,077 (6th Cir. 1981); *accord Mowdy v. Ada*

---

[2] Under the guidelines established by this Court, certiorari may be granted if "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Rule 17, Rules of the Supreme Court of the United States.

Board of Education, 76 F.R.D. 436 (E.D. Okla. 1977). Thus, there is no actual conflict among the Circuits with regard to the issue that Petitioner seeks to bring before this Court.

To the extent that the decisions in *Gruca*, *Alexander*, and the instant case conflict, said conflict has been resolved by Congress. The Third Circuit issued its *Gruca* decision in April, 1974. In that opinion, the Court concluded that the remedies of the Act are partially legal in nature, and that a statute of limitations, rather than the equitable doctrine of laches, should apply to actions brought pursuant to the statute. Soon after *Gruca*, however, Congress specifically amended the Act to provide that all actions brought pursuant to its provisions should be governed not by a statute of limitations, but by the *equitable* doctrine of laches.

As noted by the Fourth Circuit in the proceedings below, the legislative history of the 1974 amendments to the Act eliminates all doubt that Congress intended the rights and remedies established by the Act to be equitable in nature. The report of the Senate Committee on Veterans' Affairs provides, in relevant part, as follows:

> There is also added a provision at the end of this section which *reaffirms and reflects more clearly that the legal proceedings under this chapter shall be governed by equitable principles of law*, especially by barring the application of state statutes of limitation to any such proceedings.
>
> * * *
>
> Therefore, those court decisions which have either applied a state statute of limitations to completely bar a claim under the prior law . . . or have applied a state statute of limitations to partially

> bar a claim under the prior law (see e.g., *Gruca v. United States Steel Corp.*, . . .) *are not in accord with the intent of Congress* as to the application of time-barred defenses.

S. Rep. No. 93-907, 93rd Cong., 2d Sess. at 111 (emphasis added). Subsequent court decisions also have recognized that Congress intended in 1974 to overrule *Gruca* as a misapplication of the law. *See, e.g., Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1055 (6th Cir. 1983) ("The legislative history accompanying the amendments makes it clear that Congress specifically intended to overrule cases like . . . *Gruca* . . . as inconsistent with the original intent of Congress."); *Gall v. United States Steel Corp.*, 598 F. Supp. 769, 773 (W.D. Pa. 1984) ("Congress has provided that no statute of limitations, federal or state, shall apply to such actions . . . denouncing in the process the rule of *Gruca*. . . .").

It is evident from the legislative history of the 1974 amendments to the Act and from subsequent judicial decisions that Congress has legislatively overruled the Third Circuit's decision in *Gruca*. Thus, Petitioner's reliance upon that decision in an attempt to show "conflict" among the Circuits, as contemplated by Rule 17 of the Rules of this Court, is misplaced. The Fourth and Sixth Circuits are the only Courts of Appeal to have addressed the question of whether claims brought pursuant to the Veterans' Readjustment Act require a jury trial. The decisions of those courts are uniform in their denial of a jury trial and with regard to the equitable nature of the rights and remedies established by the Act. Accordingly, there is no conflict among the Circuits that would justify the granting of Petitioner's Petition for a Writ of Certiorari.

II. THE DECISION OF THE FOURTH CIRCUIT IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Even though no Circuit Court of Appeals has ever upheld his position, Petitioner contends in his Petition for a Writ of Certiorari that his claim to a trial by jury warrants the attention of this Court. Petitioner bases his claim on the premise that the Seventh Amendment provides a right to a trial by jury in cases involving legal rights and remedies, but not in an action for equitable relief. Petitioner contends that the rights and remedies established by the Veterans' Readjustment Act are legal in nature, and that he is therefore entitled to a jury trial.

Petitioner does not contend that his claim for reinstatement can be characterized as a legal remedy, but instead contends that his claim for backpay is the equivalent of a claim for legal damages. In an effort to support this contention, Petitioner relies heavily upon an excerpt from the concurring opinion of Justice Rehnquist in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 443 (1975), which Petitioner asserts is in conflict with the decision of the Fourth Circuit.

The excerpt upon which Petitioner relies reads, in pertinent part, as follows:

> To the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the court in making such

> awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment.

Albemarle Paper Co., supra at 443. In seeking to show some conflict between the above-quoted excerpt from Justice Rehnquist's opinion and the decision of the Fourth Circuit in his case, Petitioner asserts without citation that "[t]he remedy afforded by 38 U.S.C. Sec. 2022 is not discretionary, once it is established that the reemployment rights of a person protected by 38 U.S.C. Sec. 2024 have been violated." Having made this bold, unsupported statement, Petitioner asserts that the Court below departed from the decision of this Court in *Albemarle Paper Co.*

Petitioner cites no supporting authority for his statement concerning the mandatory nature of backpay awards under the Act because none exists. The remedial provisions of the Act state only that the district court in which a claim is filed "shall have the power" to order compliance with the terms of the Act and to require an employer to compensate a successful claimant for lost wages and benefits. 38 U.S.C. § 2022. At no point does the Act *require* the court to award monetary relief in the form of backpay or benefits to a successful claimant. The Act provides only that the court has the power to make such an award, thereby implicitly providing that the exercise or reservation of that power lies within the discretion of the court.

The Sixth Circuit recently rejected the same unsupported contention that Petitioner now seeks to bring before this Court with regard to the discretionary nature of backpay awards under the Veterans' Readjustment Act. In *Hanna v. American Motors Corp.*, 724

F.2d 1300 (6th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 3512 (1984), the court stated as follows:

> Title 38 U.S.C. § 2022 (1976) also provides, however, that the district court 'shall have the power' to compensate an entitled employee with lost wages. Contrary to the appellant's position, the statute does not mandate the district court to compensate an entitled employee, rather it only affords the district court the power to do so.

Id. at 1305. Awards of backpay under the Act are within the discretion of the court, and are equitable in nature. The Fourth Circuit's denial of Petitioner's request for a jury trial is in complete accord with the opinion of the Court, including that of Justice Rehnquist, in *Albemarle Paper Co.*

In a final effort to challenge the decision of the Fourth Circuit, Petitioner argues that the court incorrectly analogized the remedial provisions of the Veterans' Readjustment Act to those of Title VII, which are equitable in nature. Petitioner insists instead that the remedial provisions of the Act resemble those of § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612 (hereinafter "Title VIII"), which this Court held in *Curtis v. Loether*, 415 U.S. 189 (1974) to be legal in nature. By rejecting his proposed analogy between the Act and Title VIII, Petitioner asserts that the Fourth Circuit departed from this Court's holding in *Curtis*.

Title VIII prohibits discrimination on the basis of race, color, sex, religion or national origin in the sale, rental or financing of housing. Unlike Title VII, the enforcement section of Title VIII *specifically authorizes both equitable and legal relief.* It provides that the court

> may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the Plaintiff *actual damages and* not more than $1000 *punitive damages* . . . .

42 U.S.C. § 3612. (emphasis added).

Title VII, which prohibits the same forms of discrimination in the employment context, empowers the court only to grant equitable relief, including reinstatement and backpay. The remedial provision of Title VII states that the court may

> enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include but is not limited to, reinstatement or hiring of employees with or without backpay . . . , or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g).

In *Curtis*, this Court contrasted Title VIII's "simple authorization of an action for actual and punitive damages" with the statutory language authorizing equitable remedies under Title VII. Title VIII specifically authorizes the recovery of legal damages. The Veterans' Readjustment Act, by contrast, authorizes only the traditional equitable remedies of reinstatement and backpay. Section 2022 of the Act authorizes the court to

> require such employer to comply and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action.

38 U.S.C. § 2022.

Petitioner's contention that the Veterans' Readjustment Act is analogous to Title VIII, and that his claims thus fall within the holding of *Curtis*, is without merit. The actual and punitive damages recoverable under Title VIII cannot be equated with the lost compensation available under the Veterans' Readjustment Act. The power to award such lost wages is instead within the courts' "historic power of equity." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-17 (1975), *citing Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

In *United States v. Long*, 537 F.2d 1151 (4th Cir. 1975), *cert. denied*, 429 U.S. 871 (1976), the Fourth Circuit analyzed the nature of the relief available under Title VIII and drew a sharp distinction between the legal damages available under that statute and the equitable remedy of backpay. The Court quoted with approval from the Seventh Circuit's opinion in *Rogers v. Loether*, 467 F.2d 1110 (7th Cir. 1972):

> It is not unreasonable to regard an award of backpay as an appropriate exercise of a chancellor's power to require restitution. Restitution is clearly an equitable remedy. As Professor Moore put it:
>
> > 'In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives.'
>
> The retention of 'wages' which would have been paid but for the statutory violation (of improper discharge) might well be considered 'ill-gotten gains'; ultimate payment restores the situation to

> that which would have existed had the statute not been violated.
>
> The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses—tangible and intangible—which plaintiff has suffered by reason of a breach of duty by defendant. Such damages, as opposed to rent overcharges, unpaid overtime wages, or backpay, cannot properly be termed restitution.

467 F.2d at 1121-1122 (footnotes omitted).

The Fourth Circuit's reasoning in *Long* disposes of Petitioner's claim that his action is analogous to an action for damages under Title VIII. As recognized by the courts below, claims under the Veterans' Readjustment Act are more closely analogous to those brought under Title VII. Consequently, the Fourth Circuit's denial of Petitioner's demand for a jury trial does not conflict with the decision of this Court in *Curtis v. Loether*, and does not justify the granting of his Petition for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondent Observer Transportation Company respectfully requests that the Petition for a Writ of Certiorari in this case be denied.

Respectfully submitted,

By:/s/
JEFFERSON D. KIRBY, III
D. GERALD COKER

FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

Attorneys for Respondent